No. 15736

United States Court of Appeals

FOR THE NINTH CIRCUIT

HERRING MAGIC, a Corporation,
Appellant,

v.

UNITED STATES OF AMERICA,
Appellee.

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON,
NORTHERN DIVISION

HONORABLE JOHN C. BOWEN, *Judge*

BRIEF FOR THE APPELLEE

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OPINION BELOW

The findings of fact, conclusions of law and opinion of the District Court (R. 15-19) are not officially reported.

JURISDICTION

This is a suit for refund of a federal excise tax. The tax was paid during the period from September, 1955, through January, 1956. (R. 18.) The claim for

refund was filed on January 18, 1956, and was rejected on November 8, 1956. (R. 18.) Within the time provided in Section 6532 of the Internal Revenue Code of 1954 and on December 6, 1956, this suit was initiated (R. 12) by the taxpayer in the District Court for recovery of the taxes paid. Jurisdiction was conferred on the District Court by 28 U.S.C., Section 1346. The judgment was entered on September 6, 1957. (R. 21.) Within sixty days, on September 16, 1957, a notice of appeal was filed. (R. 21.) Jurisdiction is conferred on this Court by 28 U.S.C., Section 1291.

QUESTION PRESENTED

Whether the District Court correctly held that a device designed to attract fish by giving a natural-like swimming action to dead bait when drawn through the water was an artificial lure within the meaning of Section 4161, Internal Revenue Code of 1954.

STATUTE INVOLVED

Internal Revenue Code of 1954:

SEC. 4161. IMPOSITION OF TAX.

> There is hereby imposed upon the sale by the manufacturer, producer, or importer of the following articles (including in each case parts or accessories of such articles sold on or in connec-

tion therewith, or with the sale thereof) a tax equivalent to 10 percent of the price for which so sold:

* * * * * *

Fishing rods, creels, reels and artificial lures, baits and flies.

* * * * * *

(26 U.S.C. 1952 ed., Supp. II, Sec. 4161.)

STATEMENT

Taxpayer, a Washington corporation, manufactured a device known as Herring Magic. A patent on this device had been obtained by taxpayer's majority stockholder. (R. 17.) The device was manufactured with an opening in which the head of the dead bait was placed and secured with a pin. A line with hooks was attached to the device. The hooks were secured to the dead bait by a body clamp which kept the hooks close to the bait at all times so that a striking fish would get the hooks as well as the bait. The device remained invisible when used in the water. (R. 15, 28.)

Various sizes of the device were sold by taxpayer to jobbers, wholesalers and retailers at prices ranging from $0.7875 to $0.99 commencing March 7, 1955. This price structure has remained unchanged during all times relative to this suit. (R. 17.) Taxpayer's majority stockholder inquired of the District Director

as to whether a manufacturer's excise tax was applicable to the sale of its device. As a result of this inquiry the District Director's office notified taxpayer on June 8, 1955, that the device was subject to the manufacturer's excise tax imposed by Section 4161. (R. 17-18.)

Thereafter, taxpayer filed quarterly excise tax returns, Form 720, for the period from April 1, 1955, to December 31, 1955, and paid the following taxes on the dates and in the amounts as follows (R. 18):

September 12, 1955	$ 567.72
November 8, 1955	1,738.08
January 20, 1956	17.55

A timely claim for refund of the excise taxes paid was filed with the District Director. The District Director notified taxpayer by registered letter on November 8, 1956, that the claim for refund was disallowed. (R. 18.)

Taxpayer has borne the economic burden of the taxes for which it seeks refund and has complied with the provisions of Section 6416(a) of the Internal Revenue Code of 1954 (R. 18.)

The District Court sustained the District Director's rejection of taxpayer's claim for refund, holding that taxpayer's Herring Magic is a device which, through manufacturing design, activates the inani-

mate bait, that the activation of the inanimate bait lures the intended catch, and that the device is therefore an artificial lure within the meaning of Section 4161. (R. 15.)

SUMMARY OF ARGUMENT

Section 4161 imposes an excise tax upon sale by a manufacturer or producer of specified articles which include "Fishing rods, creels, reels and artificial lures, baits and flies." The statute does not define "artificial lures" and the words must be understood in their usual, ordinary and everyday meaning since a special meaning has not been indicated. That which is made or contrived by art or produced or modified by human skill and labor, sometimes as an imitation of something found in nature, is artificial as that term is ordinarily used and commonly understood. That which invites by the prospect of advantage or pleasure or entices is a lure as that term is ordinarily used and commonly understood.

Taxpayer's device was made or contrived by art and produced by human skill or labor. The device was designed for its single purpose of causing a natural-like swimming action imitative of live fish. This imitative swimming action was certainly an artificially produced enticement or lure for game fish. The device, therefore, comes within the ordinary and usual

meaning of the words artificial lure as used in Section 4161.

Appearance alone is not determinative of whether taxpayer's device is an artificial lure. The performance of an article is as much a part of the article as its appearance in determining its fitness. The only purpose of taxpayer's device is to activate an inert object — dead bait — in a manner imitating live fish. Taxpayer's device aptly performed this function. This performance is clearly to be considered in determining whether taxpayer's device is an artificial lure within the meaning of Section 4161, taken thereunder are designated in terms of their functional characteristics.

Accordingly, the District Court correctly held that taxpayer's device was an artificial lure within the meaning of Section 4161.

ARGUMENT

THE DISTRICT COURT CORRECTLY HELD THAT A DEVICE DESIGNED TO ATTRACT FISH BY GIVING A NATURAL-LIKE SWIMMING ACTION TO DEAD BAIT WHEN DRAWN THROUGH THE WATER WAS AN ARTIFICIAL LURE WITHIN THE MEANING OF SECTION 4161, INTERNAL REVENUE CODE OF 1954.

Section 4161, *supra*, imposes an excise tax upon the sale by a manufacturer or producer of specified articles which include "Fishing rods, creels, reels and

artificial lures, baits and flies." The tax involved here was imposed upon the ground that taxpayer's device is an "artificial" lure within the meaning of Section 4161.

The statute does not define artificial lure and those words must be understood in their usual, ordinary and everyday meaning, since a special meaning is not indicated. *Old Colony R. Co.* v. *Commissioner*, 284 U.S. 552; *Crane* v. *Commissioner*, 331 U.S. 1. This is the pragmatic test applied by the District Court when it stated (R. 15):

> The completed functional thing, therefore, is that thing which, when cast into the water, serves to attract or allure the desired fish onto the hook. * * * It is the thing which through manufacturing design artificially activates the inanimate bait as the result of the passing of the water over that thing's irregular surfaces, by which action of which thing the intended catch is lured onto that thing's hook.

As taxpayer points out (Br. 6), artificial is defined, *inter alia*, as follows (Webster's New International Dictionary (Second ed., Unabridged)):

> 1. a. Made or contrived by art; produced or modified by human skill and labor, often as an imitation of something found in nature; — opposed to *natural;* as *artificial* heat or light, gems, salts, minerals, fountains, flowers, breeding.
>
> * * * * * *
>
> 2. Feigned; fictitious; assumed; not genuine.

Taxpayer's device was "Made or contrived by art" and "produced * * * by human skill and labor." The device itself, contrary to taxpayer's argument (Br. 7, 10-13), need not necessarily be an imitation of something found in nature. The definition explicitly recognizes that an artificial object may *often* be an imitation of something found in nature but that imitation plainly is not mandatory in order to come within the definition of the term artificial. Consequently, that taxpayer's device, merely as a physical object, may not, in appearance, be an imitation of something found in nature does not, as taxpayer contends (Br. 7), render the use of the term artificial in Section 4161 meaningless. The admitted purpose of the device is to cause a natural-like swimming action by dead fish. (Br. 3-4.) This was the only purpose of the device and certainly this effect was an imitation of something found in nature.

As taxpayer also points out (Br. 6), "lure" is defined, *inter alia*, as follows (Webster's New International Dictionary, *supra*):

> 2. That which invites by the prospect of advantage or pleasure; an allurement; enticement.
>
> 3. A decoy or bait for fish or animals; * * *

The exhibits demonstrate that taxpayer's device was commonly considered a lure as just defined. The

patent application filed by taxpayer's majority stockholder constantly described the device as a lure. For example, the patent application states (Pltf. Ex. 3):

> This invention relates to a fish lure and, more particularly, to means for employment with a baiting minnow to impart lifelike motions and protect the same during trolling.
>
> * * * * * *
>
> Having in mind the defects of the prior art, it is an important object of my invention to provide a fishing lure that is adapted to receive and retain a portion of a baiting minnow, and to impart, when drawn through the water, a life-like swimming and darting motion to the bait.
>
> * * * * * *
>
> Still another object of the invention is to provide a fish lure for use with baiting minnows that imparts lateral movements to the bait, but is invisible to the fish sought to be attracted to the bait.
>
> A further object of the invention is the provision, in a fish lure as set forth, of hooks, and hook-attaching means, which serve to retain the baiting minnow, as well as to catch the fish sought, without deleteriously affecting the baiting minnow.
>
> A still further object of the invention is to provide in a fish lure of the type described, a releasable element for readily engaging the head of the baiting minnow and for retaining the same in proper associated manner with the luring device.
>
> * * * * * *
>
> A fish lure, to overcome the defects hereinbefore enumerated, must have at least two totally distinct characteristics; it must be capable of

> readily receiving and securely retaining by the head a baiting minnow; and it must also impart life-like motion to the baiting minnow without detracting from the normal luring qualities of the same as it is trolled through the water.

Taxpayer's advertising similarly constantly refers to the device as a lure. For example, the advertising states (Pltf. Ex. 4):

> I am the new "hot lure" my boss kept so long for his own use — and for a few close friends. * * * Since then I've been shaped from many materials, in many sizes, and allowed to lure just about every kind of game fish I could find. * * *
>
> * * * * * *
>
> Herring Magic's patented actionizer is the only lure your money can buy that gives whole minnows the same natural swimming motions they would have if freshly crippled by feeding fish. * * *
>
> * * * * * *
>
> A good swivel on leader, opposite end from lure, is a "must" to avoid twisting, and to allow erratic swimming action.

These references — and there are many others in the exhibits[1] — unmistakably describe taxpayer's device as a lure. Taxpayer claims that these references are ambiguous. (Br. 8-10.) We submit that these references demonstrate the common understanding of

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[1] See for example the testimony of taxpayer's majority stockholder at R. 52.

the word lure; the references demonstrate the intent to promote a common understanding that taxpayer's device was a lure as ordinarily defined above.

Accordingly, taxpayer's device was an artificial lure because it was a contrivance resulting from human skill and its intended single purpose — and practical utility — was to effect an enticement for game fish. The device, therefore, comes within the ordinary and usual meaning of the words artificial lure as used in Section 4161.

In using the words artificial lure in their ordinary and usual meaning, we submit that Congress was designating articles generically in terms of the functional characteristics of the article. It is of course correct, therefore, to consider the functional characteristics of the article, as the District Court did, in determining whether the article is an artificial lure.[2]

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[2] The cases relied upon by taxpayer (Br. 11-12) are not controlling here. They involved the construction of tariff statutes where considerations which may not be appropriate here may be appropriate in construing the tariff statute. On the other hand, the tariff statue illustrates a designation in terms of functional characteristics. In *Morimura Bros.* v. *United States*, 8 Cust. & Pat. App. 111, 112, the statute designated "artificial and ornamental fruits" and "Feathers and downs". By way of contrast, in the same statute, the designation of "Feathers and

Compare *White* v. *Aronson*, 302 U.S. 16, 17-19; Rev. Rul. 54-320, 1954-2 Cum. Bull. 411.

Taxpayer seems to argue that imitative appearance alone is determinative of whether its device is an artificial lure. (Br. 7, 10-12.) Appearance alone, however, is not determinative. The performance of an article is as much a part of the article as its appearance. As was stated in *Hine* v. *United States*, 113 F. Supp. 340, 343 (C. Cls.), the use or practical purpose of an item as designed shows logically what the item is. See, also, *Samuel Winslow Skate Mfg. Co.* v. *United States*, 50 F. 2d 299 (C. Cls.), certiorari denied, *sub nom. Endicott, Trustee*, v. *United States*, 285 U.S. 555; *Union Pac. R. Co.* v. *United States*, 111 F. Supp. 266 (C. Cls.). There are many artificial lures for fish, such as "spoons," which do not resemble any natural fish food apart from their action when drawn through

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downs, * * * when dressed, colored, or otherwise advanced or manufactured in any manner, and not suitable for use as millinery ornaments," is in terms of functional characteristics just as the designation in the same statute of "artificial or ornamental feathers suitable for use as millinery ornaments." It may be pointed out that in the *Morimura* case, p. 114, where the "*per se* character and not the ultimate or intended use" was controlling, the designation was "artificial or ornamental fruits" which was not in terms of functional characteristics which we contend is the nature of the designation involved in Section 4161.

water. The purpose of taxpayer's device is to activate an inert object — dead bait — in a manner imitating live fish by causing natural-like swimming. That swimming movement certainly is not natural movement of the dead fish; it is artificially produced movement feigning that of the natural and live fish.

In the final analysis, taxpayer's argument comes down to a contention that its device is not an artificial lure because a dead minnow must be used with it. But the dead minnow is not of itself a lure, whereas, on the other hand, the swimming action which taxpayer's device gives to the minnow makes the whole an artificial lure. The use of pork rind, for example, with other types of lures does not make them any the less artificial lures. In imposing an excise tax on a group of articles designated broadly as "Fishing rods, creels, reels and artificial lures, baits and flies," Congress could hardly have intended to make taxability depend upon technical distinctions as to how and why particular items fall within the stated categories.

Therefore, we submit that the District Court properly concluded (R. 15) that taxpayer's device—

> is the thing which through manufacturing design artificially activates the inanimate bait as the result of the passing of the water over that thing's irregular surfaces, by which action of

> which thing the intended catch is lured onto that thing's hook. That device is the 'artificial lure' taxed by the statute

The decisions relied upon by taxpayer are inapposite.[3]

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[3] Taxpayer cites and quotes from *California C. I. Ex.* v. *Indus. Acc. Com.*, 13 Calif. 2d 529, 90 P. 2d 289, and *Gould* v. *Gould*, 245 U.S. 151. (Br. 10, 14.) The *Gould* case involved the question of whether alimony payments constituted income to the wife and was deductible by the husband. In the *California C. I. Ex.* case the court was interpreting the state legislature's intent in the state's Workmen's Compensation Act which provided for compensation in the instance of injury to artificial members. This is clear from the Court's remark (13 Calif. 2d 529, 533, 90 P. 2d 289, 291):

> "The legislature has only gone so far as to provide for compensation for injury to *artificial members*. Whether it may in the future seek to go beyond this point is not a proper question for our consideration at this time."

CONCLUSION

The judgment of the District Court is correct and should be affirmed.

Respectfully submitted,

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